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IN THE

Supreme Court of the United States

W KEVIN HUGHES, ET AL., *Petitioners*,
v.
TALEN ENERGY MARKETING, LLC, FKA PPL ENERGYPLUS, LLC, ET AL., *Respondents*.

CPV MARYLAND, LLC, *Petitioner*,
v.
TALEN ENERGY MARKETING, LLC, FKA PPL ENERGYPLUS, LLC, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY FOR PETITIONER CPV MARYLAND, LLC

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REPLY FOR PETITIONER CPV MARYLAND, LLC

All of Respondents' and the Government's preemption theories fail because they are neither connected to the division of state and federal authority set forth in the plain words of the Federal Power Act ("FPA"), nor consistent with this Court's cases describing that division.

I. FIELD PREEMPTION

A. Maryland Limited Its Directions To Entities And Matters On Its Side Of The Jurisdictional Line

What Respondents call Maryland's "scheme" was Maryland's direction to its local utilities to hold a competitive procurement designed to facilitate construction of a needed power plant, and to contract with CPV, the successful bidder. CPV agreed to build that power plant and sell its electricity into the federally-supervised PJM markets, adhering to all market rules. "In exchange" for providing the local utilities with its revenue from those sales, CPV "receives the Monthly Payment Amount" – CPV's offer price – from the local utility. J.A.388 (Article 3.2(d)). Regulation of the contracting decisions of local retail utilities is a field in which the FPA preserves the States' authority, and (except as specifically provided by Congress, *infra* at 8–9) FERC has none.

Maryland's supervision of its own local utilities – squarely on the States' side of the "bright line,

easily ascertained"[1] – surely *affected* things on FERC's side of the line. But a central, explicit tenet of this Court's energy-related preemption cases is dispositive here: If the State regulates on its side of the jurisdictional line, the *effect* of that regulation on entities and activities within FERC's jurisdiction does not justify *field* preemption. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 514 (1989).

The state and federal regulatory fields are statutorily defined based on who and what is being regulated, not where the effects of the regulation are felt. Thus, *federal* regulation directed at interstate wholesale sellers and their rates remains in the federal field "no matter the effect on retail rates" in the state field. *FERC v. Elec. Power Supply Ass'n*, Nos. 14-840, 14-841, slip. op. 19 (Jan. 25, 2016) *("EPSA")*. Conversely, state regulation of local retail utilities on its side of the line cannot be *field* preempted based on its effect on matters subject to federal regulation.

States run into field preemption trouble only when they reach across the line to regulate entities and activities subject to federal regulatory jurisdiction, namely, interstate wholesale *sellers* and *sales* of electricity (or gas). *E.g.*, *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84 (1963); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015). Maryland avoided trouble here because Maryland's regulatory activity was limited to directing its own

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[1] *Fed. Power Comm'n v. S. Cal. Edison, Co.*, 376 U.S. 205, 215–16 (1964).

jurisdictional utilities to solicit and enter into these contracts for differences ("CFDs").

CPV agrees with Respondents that Maryland could not pursue even laudable objectives by exercising regulatory authority assigned exclusively to FERC. However, as demonstrated in CPV's opening brief, Maryland's methods were as proper as its goals. Maryland exercised no regulatory authority assigned to FERC.

The Fourth Circuit held that Maryland "functionally set[]" CPV's rates, thereby regulating in a FERC-jurisdictional field.[2] Pet.App.17a. A direction to conduct a competitive procurement, and to enter into a contract *with* a FERC-jurisdictional seller, does not "set" the seller's rate. That principle controls this case.

This is both the correct rule and settled in FERC's own decisions. See CPV Opening Br.38–39 (citing cases). "[I]t is the *states* that have the authority to dictate a utility's actual purchase decisions." *Cal. Pub. Utils. Comm'n*, 134 FERC ¶61,044, P 30 (2011) (emphasis in original).

Respondents ignore these cases, and declare this Court's cautions against overstating federal authority "beside the point," Resp.Br.31, because Maryland's "scheme" is such a "blatant" and "unambiguous" violation of the prohibition on States

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[2] Cf. *EPSA*, slip op. 21–22 ("'the rate is what it is,'" not some "functional equivalen[t]" or "effective" rate) (internal quotation marks omitted). Here, Maryland neither actually nor "functionally" set CPV's rates.

regulating "interstate wholesale rates" that nothing else matters. *Id.* at 2, 20, 41. That is a bold claim, but incorrect. Maryland has not *regulated* any interstate wholesale rate, either in the CFDs or in connection with CPV's PJM-market sales.

The Government acknowledges this Court's cases but misconstrues them. Quoting *Northern Natural* and *Oneok*, it says the test is whether Maryland "aimed directly at interstate purchasers and wholesales for resale." Gov.Br.21. But the cited "test" was addressed to state attempts to regulate *FERC-jurisdictional interstate wholesale sellers*, not local utility retailers. See discussion, *infra*, I.C. In this case, Maryland aimed its regulation at its own local retail utilities, directing them to enter into contracts to ensure that a much-needed power plant was constructed. These are matters over which the State, not FERC, has regulatory authority.

B. FERC's FPA Field Encompasses Wholesale Sales And Sellers, Not Local Utilities' Contracting Decisions

1. Maryland Did Not Regulate CPV's Rates

Respondents argue that the CFDs contain "rates and charges made, demanded or received ... for or in connection" with CPV's wholesale sales of energy and capacity, and thus fall within FERC's review authority.[3] See, *e.g.*, Resp.Br.24, 28–29, 30, 35.

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[3] CPV asserted below that there could be no preemption here because FERC disclaims jurisdictional interest in financial contracts. See *Mkt.-Based Rates for Wholesale Sales of Elec.*

(continued...)

That the CFDs may be reviewed by FERC does not mean they are field preempted. That again follows from *Northwest Central* and *EPSA*: If Maryland exercised regulatory authority reserved to it, the fact that Maryland's actions *affect* matters subject to FERC's authority – review of wholesale rates, contracts, or auction market rules – does not make them field preempted. Any contrary rule would eviscerate the States' role in supervising their local utilities' contracts: Every state direction to a local utility to purchase electricity or contract to build power plants gives rise to contracts within FERC's jurisdiction, or otherwise affects FERC-supervised markets.

Accordingly, as Respondents and the Government ultimately concede,[4] a field preemption finding requires that the State exercise regulatory authority assigned exclusively to FERC. The lower courts also understood that point. If Maryland did not exercise FERC's "rate-setting" authority, there could be no field preemption. However, they

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(continued...)

Energy, Capacity & Ancillary Servs. by Pub. Utils., 119 FERC ¶61,295, P 1,062 n.1201 (2007) (disclaiming concern with contracts "designed to assist buyers and sellers of electricity in hedging against adverse price changes which are settled in cash and where parties do not take actual delivery of the electricity"). The district court held that these contracts were FERC-jurisdictional because they address delivery of capacity, Pet.App.122a, 123a, a ruling not challenged here. FERC itself has not addressed that question, and, as CPV argued below, there is no preemption here whether FERC concludes that it has jurisdiction of these contracts or not.

[4] Resp.Br.24; Gov.Br.17.

concluded that Maryland did exercise power belonging to FERC, ostensibly by setting the rate for CPV's interstate sales. Their conclusion was wrong. CPV.Br.37–42.

Respondents argue that Maryland exercised authority belonging to FERC because Maryland's directions to its local utilities affected "rates ... received" by CPV under the CFDs. Resp.Br.28–29 (citing §824d). Respondents wrongly equate *affecting* what CPV receives with *regulating* CPV's rates received for an interstate sale. When a State supervises its local utilities' contracting decisions, it is *regulating* the local utilities' decisions – which are *not* within FERC's jurisdiction – *not* the seller's "rates and charges," which are. Indeed, Respondents' argument would prevent a State from supervising its local utilities' purchases because any purchasing decision affects what the seller "receives."

Respondents' argument that Maryland is regulating CPV's rates "received" for sales of capacity *to PJM*, overriding the FERC-approved rate for that sale, see Resp.Br.28–29, is inconsistent with the plain language of §824d for a second reason. That section provides for FERC jurisdiction over *rates and charges* received. But, as this Court recently confirmed, a *rate* is the "'amount *paid* ... for a good.'" *EPSA*, slip. op. 21 (emphasis added) (internal quotation marks omitted). Here, the rate "received" by CPV for a sale to PJM is the "amount of money [PJM] will hand over in exchange" for that sale. *Id.* Maryland did not touch, let alone regulate, that rate. See infra, I.D.

2. The FPA Leaves Buy-Side Authority To The States

The FPA preserves the States' authority over local retail utilities on the "buy-side" of interstate transactions; FERC's authority is over interstate wholesale *sellers* and *sales*.[5] The FPA addresses "the business of ... *selling* electric energy." 16 U.S.C. §824(a) (emphasis added). It establishes federal regulation of "*the sale* of such energy at wholesale in interstate commerce." *Id.* (emphasis added). It covers "that part of such business which consists of ... *the sale* of such energy at wholesale in interstate commerce ... such Federal regulation ... to extend only to those matters which are not subject to regulation by the States." *Id.* (emphasis added); *id.* §824(b)(1) (federal regulation of "the sale of electric energy at wholesale in interstate commerce"). See *id.* §824(d) ("'Sale of electric energy at wholesale' ... means a sale ... to any person for resale").

Review of wholesale sellers' rates is the core of the statute. Sellers file rate schedules and contracts with FERC, showing "rates and charges for any ... sale." 16 U.S.C. §824d(c). FERC reviews "rates and charges made, demanded or received ... for or in connection with the ... sale of electric energy ...." 16 U.S.C. §824d(a). See also 16 U.S.C. §824e(a). That

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[5] "FERC has the exclusive authority to review the rates, terms and conditions of 'sales' but not of 'purchases' ('purchases' are the province of state commissions)." Lawrence R. Greenfield, FERC, *An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities in the United States* (Dec. 2010) (emphasis in original), http://goo.gl/IvpTHn.

federal review is, of course, limited to wholesale sales. Regulation of "any other sale," §824(b) – by retail sellers – is left to States alone.

The FPA creates no *federal* regime over purchasers, purchasing decisions or offers to purchase. Purchasing and contracting by local retail utilities whose *retail* rates are determined by the States is within the States' domain. Until the Fourth Circuit's decision, it was never doubted that States have exclusive regulatory authority over their local utilities' contracts with interstate sellers.[6]

"It is the *states* that have the authority to dictate a utility's actual purchase decisions." 134 FERC at P 30 (emphasis in original); *id.* (acknowledging the "reality" that "states have the authority to dictate the generation resources from which utilities may procure electric energy"). See Gov.Br.34 (State may require "that local utilities ... purchase ... from a particular generator"). As shown in CPV's opening brief, this Court's decisions and those of the courts of appeals confirm state authority on the "buy-side" of interstate wholesale transactions with local utilities.

When Congress wants to extend federal authority to the purchasing side, it does so expressly. For example, FERC has authority over deceptive practices involving a "purchase or sale" of electric energy. See 16 U.S.C. §824v(a). Likewise, when Congress chose to extend federal jurisdiction to

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[6] Of course, if a local retail utility were to *sell* electricity into interstate wholesale markets, those sales would be at FERC-supervised rates, and subject to FERC authority.

aspects of the purchasing decisions of local retail utilities, as it did with PURPA (where Congress extended federal authority to purchases from cogeneration and small power production facilities), Congress was explicit about the limitations of that displacement, and cognizant of pre-existing state authority. See 16 U.S.C. §824a-3(a)(2) (FERC may enact rules requiring utilities to offer to "purchase" electricity); 16 U.S.C. §824a-3(b) (prescribing basis for "rates for purchases by electric utilities"). And consistent with Congress's acknowledgment of the States' preexisting authority, *e.g.*, 16 U.S.C. §824a-3(m)(6), FERC recognized that except for PURPA's limited displacement of state authority, States retain "authority ... to review contracts for purchases as part of [a State's] regulation of electric utilities."[7]

The FPA's express division of state and federal responsibility establishes that Maryland did not cross any dividing line here. Maryland regulated the contracting decisions of its local utilities. Maryland did not regulate any wholesale seller, wholesale sale, or wholesale seller's rates.[8] Any rate set in the CFDs was set by CPV, not the State, and always was, and remains, subject to FERC review. And the rate for CPV's sales to PJM in the PJM auction was

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[7] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed.Reg. 12,214, 12,233 (Feb. 25, 1980).

[8] Cf. *Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047, P 69 (2010) (state direction to utilities to purchase capacity is "not preempted," but establishing the *only* price at which the State's local utilities would buy sets the seller's rate).

and remains exclusively subject to FERC review, not Maryland's.

3. Maryland Never Surrendered Its FPA-Preserved Authority Over Its Local Utilities' Contracting Decisions

Respondents suggest that in "doing away with vertical integration" and encouraging local retail utilities to purchase electricity in PJM's or other interstate markets, States somehow surrendered their historic authority over their own local retail utilities, preserved to them by the FPA. There was no surrender, simply a recognition that in authorizing their local utilities to participate in interstate markets, those utilities will have to abide by the rules of those markets, and FERC's review.

By participating in the PJM markets (with permission of their state commissions), local retail utilities (as well as generators like CPV) *expressly* agree to abide by rules governing such participation, including rules requiring them to purchase capacity in the PJM auction.[9] Those rules are subject to FERC review, and FERC's orders are subject to judicial review. *E.g.*, *NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010). The decisive point here is that there is no PJM rule, and no FERC order, barring contracts for differences. If PJM were

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[9] See PJM Interconnection, L.L.C., *Reliability Assurance Agreement Among Load Serving Entities in the PJM Region*, Rate Schedule FERC No. 44 (eff. Sept. 17, 2010), http://goo.gl/eOxCXF.

to promulgate such a rule (it hasn't), and if FERC were to approve it, it could be tested in the courts.[10]

Respondents' Supplemental Brief at 1,2,3,5 cites *EPSA* where the Court states that a "State could not oversee offers, made in a wholesale market operator's auction ...." Slip. op. 26. Respondents' reliance on that quotation fails for the same reasons its other arguments fail. "Oversee" plainly refers to state *regulation* (indeed, in context, to "state commissions" attempting to "regulate demand response bids," *id.*), and there was no state regulation of any bids, demand response or otherwise, here. Maryland regulated its local utilities. CPV's auction offer was reviewed in detail *by PJM*, with FERC's approval, not Maryland's. Pet.App.93a–94a. Nothing in *EPSA* casts doubt on state authority over local utilities or a State's prerogative to regulate contracting decisions of local retail utilities simply because those utilities enter into contracts with wholesale sellers, whose bids are within FERC's jurisdiction.

A State's direction to its utility to solicit and enter into a contract with a wholesale seller does not invade FERC's authority to oversee any aspect of the seller's rate, or the resulting contract. Unlike a state attempt to *regulate* a jurisdictional seller, a State's direction to one of *its* jurisdictional utilities to offer a contract to a FERC-jurisdictional seller results in

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[10] Indeed, the D.C. Circuit held that FERC's PJM rules could not permissibly limit FPA statutory rights, *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 9–10 (D.C. Cir. 2002), which includes the right to contract.

that contract being subject to FERC authority in just the way the FPA contemplates: States maintain control of contract creation on the local retail utility side. If the contract is with a wholesale seller, FERC reviews the seller's rates and charges in the resulting contract.

C. The Government Misconstrues The Court's Precedents

This Court's natural gas cases make clear that whether a State is regulating an interstate wholesaler, as opposed to an entity or activity over which the FPA preserves state regulatory authority, is a decisive consideration in *field* preemption analysis. See *Nw. Cent.*, 489 U.S. at 514. Here, Maryland steered clear of regulating entities and activities that FERC regulates: the seller's rates and practices affecting those rates. It limited its involvement to the local utility side of the transaction, before any contract – reviewable by FERC – was executed.

The Government and Respondents entirely misread the passage from *Oneok* (quoting *Northern Natural*), stating "that the proper test for purposes of pre-emption in the natural gas context is whether the challenged measures are 'aimed directly at interstate purchasers and wholesales for resale' or not." *Oneok*, 135 U.S. at 1600. The "interstate purchasers" held off-limits to state regulation in *Northern Natural* were interstate wholesale sellers subject to comprehensive *FERC* rate-review jurisdiction. The Court was not addressing purchases by local retail utilities, whose purchasing decisions and rates were, and remain, subject to state control.

In *Northern Natural*, a State tried to abrogate gas purchase contracts of FERC-jurisdictional interstate gas wholesalers, whose rates for gas sales were reviewed by FERC. The State claimed its regulation was a conservation measure. The Court explained that the State could pursue conservation *by regulating producers and production*, as reserved to States by the NGA. The State could not do so by regulating wholesale sellers, whose rates were subject to comprehensive FERC cost-of-service rate review that included consideration of their purchases. See *N. Natural*, 372 U.S. at 94. States could not "aim" there. See *id.* at 91–92.

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), likewise addressed a State's attempt to regulate interstate wholesale sellers' securities, because securities issuances often determine the interstate seller's rates. The Court described how FERC examined securities issuances in deciding on permissible rates. *Id.* at 307–08. Therefore, the state effort to regulate interstate wholesale sellers in that way improperly crossed into the federal field.

In sum, *Oneok*'s reference to impermissible state regulation of "interstate purchasers and wholesales for resale" involved state attempts to regulate *interstate wholesale sellers*, whose rates are determined by FERC. Those cases did not involve state regulation of local retail utilities, whose retail rates are set by the State and whose purchases are subject to state control. Indeed, *Oneok* holds that even if the State's regulation of interstate wholesale sellers overlaps with federal regulation, it may be permissible if the State was not aiming at the FERC-regulated field. See 135 S. Ct. at 1600–01.

By contrast, in *Northwest Central,* 489 U.S. at 514, the State did *not* regulate the activities of interstate wholesale sellers. Rather, it regulated gas producers *qua* producers, subject to state, not FERC, jurisdiction. Because the State confined its regulation to activities and entities within its statutory authority, the *effect* of that regulation on wholesale rates could not be the basis for field preemption. *Id.* The "field" is defined by what, or whose, activities are regulated, not where the effects of the regulation are felt. See also *EPSA*, slip. op. 19.

In terms of "targets" and "aims": Maryland aimed at addressing a reliability issue by getting a new power plant built – squarely within its authority. In so doing, it targeted the contracting decisions of its local retail utilities, also within its authority. That Maryland's orders affected matters subject to FERC authority is not a basis for field preemption.

The Government tries to expand the notion of prohibited "aims." It argues that Maryland improperly aimed at the federal field because (even though the CFDs require compliance with all PJM and FERC rules, J.A.390–91) they require CPV to offer capacity into the PJM auction, and condition payment on CPV's bid clearing. Gov.Br.21.

The Government's theory loses sight of the fact that the Court's "aim" analysis focuses *first* on the entities and activities being regulated, not those areas affected by the regulation. Unlike *Northern Natural*, *Schneidewind* and *Oneok* (but like *Northwest Central*), Maryland here exercised no regulatory authority over the wholesale seller, CPV.

CPV reviewed the terms of the proposed CFDs, independently proposed rates, and voluntarily entered into those contracts. CPV was not regulated. See Gov.Br.29 ("a financial incentive ... is not the equivalent of actual regulation").

Moreover, even if Maryland's "aim," merely as to the CFDs' bid and clearing terms, were relevant in the absence of state regulation of an interstate wholesale seller, there was no "purposive" state overreach into the federal field; there is nothing intrusive about the CFD requirement to sell into the PJM auction. The sale into the PJM auction provides a hedge for the benefit of the local utilities' ratepayers. The revenue from selling at the auction clearing price offsets what the local utilities must pay to buy that same quantity of capacity at the auction clearing price. See CPV.Br.16–17; see *infra* at 21. The CFD thus provides a long-term, stable foundation for *retail* pricing. That is a matter as solidly within state authority as facilitating power plant construction or supervising the local utilities' contracting decisions. And, as in *EPSA*, any notion of intent to overreach is dispelled by the CFDs' express requirements to comply with all FERC and auction rules. See *EPSA*, slip. op. 25.

The Government also cites *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). In contrast with the *Oneok* line of cases, in these cases, the State was regulating local retail utilities within its jurisdiction. Therefore, as this Court observed, the issue was not *field* preemption, but *conflict* preemption. *Oneok*, 135 S.Ct. at 1601. And in each case, the conflict was manifest and concrete: the State's refusal to allow its

local utility to recover a FERC-authorized price – trapping the cost – nullified FERC's determination that the price paid was just and reasonable.

Here, there is no trapped cost, and providing a generator a guaranteed payment stream in exchange for revenue that the generator earns from FERC-approved sales does not nullify any FERC order or rate.

Indeed, *Mississippi Power* and *Nantahala* present another reason why preemption is wrong here. There, the state denials of cost-recovery could not be reviewed by FERC. It fell to the courts to resolve any conflict. Here, FERC can (and did) determine the conditions for CPV's sale into the PJM market. And it can review any rates under §824d(a).[11] *NRG*, 558 U.S. at 171. That the contracts are subject to FERC review confirms that they do not usurp or conflict with FERC power.

D. There Are Two Sales, Not One

Respondents argue that even if Maryland did not set a rate, the CFDs are preempted because they impose a "different price" for CPV's future sales to PJM than the price FERC will come to approve for such sales. Resp.Br.25–26.

Respondents' two prices/one sale theory is a linguistic trick. There are two separate transactions

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[11] Respondents comment that CPV did not file these contracts with FERC. Resp.Br.46. First, CPV had market-based rate authority and no obligation to file. Pet.App.123a–25a. Second, under FERC's rules, contracts cannot be filed until shortly before they go into effect. See 18 C.F.R. §35.3(a)(1).

at issue here, involving different exchanges, different counterparties, and different prices. The first transaction, the CFDs, requires CPV to, *inter alia*, build a power plant in exchange for CPV receiving its bid price (designed to allow it to recover its revenue requirements to build and operate the plant).[12] The second involves CPV's sales to PJM in the capacity and energy auctions.

When CPV sells to PJM, CPV receives, and PJM pays, only the price FERC approves for that transaction – not a penny more or less. When those transactions settle, the CFDs kick in, with CPV trading to the local utilities its PJM sales revenues in exchange for its bid price. Specifically, CPV provides the local utilities with its

> revenues from sales and other activities, including but not limited to those from the sale of the Facility's electricity products and services into the PJM energy and capacity markets [except for ancillary services markets .... In exchange for providing the [local utility] all revenues, [CPV] receives the Monthly Payment Amount [its fixed monthly revenue requirement as bid] from the [local utility] who collects said compensation through retail rates approved by the MDPSC. This

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[12] The district court concluded that compensation paid CPV *includes* sale of capacity to PJM, but Respondents are wrong in suggesting that the district court determined this was the sole purpose of the contracts, which includes building a power plant. Pet.App.119a.

> Agreement is settled financially on a monthly basis ....

J.A.388 (Article 3.2(d)).

Consequently, there are two relevant transactions, not "one," with different counterparties and different consideration; *i.e.*, with different prices for different exchanges.[13] Respondents are just wrong then to assert that Maryland tried to "alter the price of a sale to PJM." Resp.Br.28. The price for the sale of capacity to PJM is the "amount of money [PJM] will hand over in exchange" for that capacity. *EPSA*, slip. op. 21. Significantly, Maryland has not regulated CPV's rates, or interfered with FERC's review, for either transaction. And that further points to why Respondents' argument is contrary to the FPA.

The FPA grants CPV, as seller, a unilateral right to change rates or enter into contracts. FERC's authority is limited to reviewing contracts after they are filed. See *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956) ("[FPA] merely defines the review powers of [FERC] ... it purports neither to grant nor to define the initial rate-setting powers of natural gas companies").[14] FERC itself cannot restrict a seller's right to contract, provided FERC's authority to review the executed contract is

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[13] See NRG Amicus Br.30–31 (describing hedge transactions).

[14] See *Mobile*, 350 U.S. at 343 (NGA sellers can "establish ex parte, and change at will, the rates offered to prospective customers; or ... fix by contract ... the rate agreed upon with a particular customer"). See *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (applying *Mobile* to the FPA).

preserved. Because FERC's authority was preserved here, Maryland's involvement with these CFDs could not have usurped FERC authority.[15]

Respondents also assert that if "the state itself paid CPV a subsidy (or occasionally recouped a 'rebate') for each of CPV's sales to PJM, its actions would clearly be preempted." Resp.Br.48.

Wrong. If Maryland *itself* agreed to pay a developer its bid price in exchange for the developer building a plant and turning over all the capacity revenue and profits from electricity sales for 20 years, that would be uncontroversial from a field preemption standpoint. The State would not be setting rates or "regulating" any contract subject to the FPA. Indeed, if a State decided simply to provide financial support to a power plant that was failing because its market revenues were too low, or to incentivize new construction, it is difficult to see how giving money to the power plant would intrude on any exclusive FERC field.

The CFDs, however, addressed Maryland's needs more effectively. Maryland facilitated development of a needed power plant, protected retail ratepayers by requiring its jurisdictional utilities to enter into price-stabilizing hedges, and ensured that those ratepayers would, at most, pay only the difference between CPV's costs to build the plant and the market revenues from the plant's sales of capacity and energy. Simply put, these CFDs

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[15] While a seller could *contractually* surrender its "freedom" to enter into additional contracts, *Atlantic City*, 295 F.3d at 10–11, nothing in PJM's rules required CPV to do so.

measured the extent of any rebate or subsidy by the difference between CPV's fixed bid and the variable revenues the plant would earn from sales to PJM. A flat grant or tax break would open the possibility of a windfall to CPV – in excess of the stable revenue stream it required to recover its costs to construct and operate its plant as set forth in its competitive bid.

E. Maryland Did Not Set Any Price

Respondents assert in passing that Maryland set CPV's price by forcing the local utilities to accept the price contained in the contracts. Resp.Br.54; see J.A.330–31 ("withdrawal and rejection right").

Wrong again. Directing a local retail utility to make a purchase is not rate-regulation or rate-setting. Rather, it is what it appears to be: regulation of the decision to purchase at the rate set by the seller. State utility commissions, not FERC, have jurisdiction over those "buy-side" decisions.

CPV determined its bid price based on the revenues it required to build and operate the plant. Pet.App.89a–90a. The Maryland commission accepted CPV's proposal and its price. Maryland did not set the price.

F. There Is No Relevant Basis To Distinguish A Hedging Contract From A Capacity Purchase Agreement

Respondents argue that one could distinguish these financially-settled contracts from "traditional" long-term bi-lateral contracts to sell capacity to local utilities. However, Respondents offer no legal or logical basis for doing so relevant to a field preemption analysis.

As described above, the FPA preserves state authority over local retail utilities. That power does not distinguish among a direction to enter into a contract for differences, to contract to buy capacity, or to build a power plant. The power is over the entity, *i.e.*, its local utility – its contracts, and its activities, as defined by state law.

Beyond the absence of a legal distinction, there is no practical economic difference between a long-term power purchase agreement and the CFDs here – save one. If required to purchase CPV's capacity, each local utility would still have been required to buy its capacity requirements from the auction at the clearing price. It would thus offer into the auction all of the capacity it already controlled, including what it bought from CPV, and receive the clearing price. A long-term capacity purchase agreement hedges against the local utility's obligation to buy its capacity from the auction at prices that vary each year, and that over a number of years might exceed the price available under the purchase agreement. The CFDs do the same.

However, if the utility owned the capacity, the risk of not clearing the auction would be on the utility. Under the contracts for differences, CPV bears that risk. See No. 14-614 Pet.App.33a ("Thus, the risk of not clearing in the [auction] is left on the Supplier, not ratepayers").

G. Maryland's Aims Were Permissible

Respondents try to impugn Maryland's aims, asserting that Maryland sought to "suppress[]" prices. See Resp.Br.26.

First, Respondents are wrong on the facts. The district court's findings, and Maryland's orders, show Maryland's consistent focus on reliability: the need for a new power plant to "keep the lights on." See Pet.App.79a–87a; 14-614 Pet.App.29a, 60a; J.A.303–06.

Second, even if Maryland sought to reduce retail prices by increasing supply, it would not change the preemption analysis. Every state decision to build or close power plants affects supply, and, in turn, price. In preserving state control over generation, Congress surely realized that States were not indifferent to supply and demand and the impact on price of increasing the former or decreasing the latter. No serious preemption argument could be made if the State simply directed its local utilities to build new power plants. But the *effect* of such a directive on wholesale prices would be identical, although incontestably a result of the State's own field and thus not field preempted.

Of course, if FERC finds something objectionable about the effects of state support for new generation on its side of the jurisdictional line – whether wholesale sales or PJM auctions – it can address it with appropriate rules in its own regulatory domain. Indeed, here FERC did so, holding that under its revised MOPR, should a new, state-supported power plant clear the auction, then that plant is "needed by the market and ... [its] presence in the market ... does not artificially suppress market prices." J.A.91.

Third, Respondents try to bolster their price-suppression assertion with some muddled economics. They say Maryland required CPV to offer capacity

into the auction, rather than to local utilities, to suppress prices. Resp.Br.52. But the impact on the PJM auction would be the same whether CPV or the local utilities owned the capacity. Either way, it would be offered into the auction and would have whatever effect additional supply has on price.[16]

II. CONFLICT PREEMPTION

Neither Respondents nor the Government identify any actual conflict with federal law. They instead postulate FERC policies in ostensible conflict with Maryland's orders here.

The Government says that Maryland's actions provided incentives for power plant construction different from auction price signals. (It oddly says that Maryland "directly aimed" at the PJM market by creating incentives outside it. See Gov.Br.33.) The sufficient answer is that the auction was never intended as the exclusive means to signal a need for new construction or the exclusive source of construction incentives. Even accepting the doubtful premise that FERC had authority to create an exclusive source of construction incentives, FERC itself acknowledged that States could supplement auction price signals by offering long-term contracts, as they felt necessary. See CPV.Br.49–52.

Respondents claim conflict with policies emanating from PJM's internal-auction "NEPA"

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[16] In fact, under PJM's 'must offer requirement,' existing generators and other capacity owners whose capacity is relied upon by load serving entities (such as the local utilities here) must offer their capacity into the auction. PJM Open Access Transmission Tariff, Att. DD, §6.6 (eff. Feb. 18, 2012).

rule. To repeat the comments in CPV's opening brief: Neither PJM's auction rules, nor FERC's orders approving them, establish "policies" applicable outside the auction.

FERC determined that its NEPA rule served a narrow purpose, and should be limited to that purpose. *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157, P 94 (2009). FERC declined to repurpose NEPA to provide price stability for potential developers, paid for by auction purchasers. The capacity auction itself was simply not designed to provide "long-term revenue assurance for developers." *Id.* But FERC's desire not to use the auction to provide long-term price stability for developers creates no "policy" against long-term revenue assurances *outside the auction*, paid for by a State's retail ratepayers, not PJM market participants. It would be odd indeed for FERC to establish new MOPR rules for state-sponsored long-term contracts if it regarded such contracts on their face to be in conflict with some FERC policy.

The Government's final conflict preemption theory begins by quoting a FERC order stating that allowing subsidized generators to participate in the auction could distort auction price signals. Gov.Br.25. The Government omits FERC's conclusion in the next paragraph: the MOPR changes resolved that potential distortion. J.A.100–01. Those changes required cost-justified bids, and, in FERC's view, prevented adverse effects on wholesale rates. See CPV.Br. 56–57.

The Government also hypothesizes a loophole in the MOPR, because, as amended, it allows a developer to bid a default price based on generic

construction costs, which theoretically could be below the developer's actual costs. But as explained in CPV's opening brief, there are two fallacies in that argument: First, it has nothing to do with this case; CPV did not bid a default price, CPV.Br.58; CPV's bid was based on its actual costs. Pet.App.93a–94a.

Second, more fundamentally, the Government is attacking FERC's own rules. If FERC thinks there really is a worrisome hole in its MOPR – as opposed to a FERC determination that a default bid meets all of its objectives – FERC can close it. Arguments asking this Court to judge which auction bids are proper and which are improperly price suppressive are misplaced as preemption theories. They should be, and were, addressed by FERC, and only should come to the courts on review of FERC's decision (as they did in *New Jersey Board of Public Utilities v. FERC*, 744 F.3d 74 (3d Cir. 2014)), not dressed up as preemption theories.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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